YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S-23NCVC-14 OF 2010
PRASAD ABRAHAM J
21 NOVEMBER 2011

Tort — Defamation — Libel — Defendants republished defamatory article about plaintiff in Member of Parliament's blog — Veracity of article not verified — Plaintiff's views to article not sought — No disclaimer made that views in article belonged to blogger's — Whether allegations about plaintiff false — Whether defendants could claim ancillary derivative privilege — Whether article in blog protected by qualified privilege

The plaintiff, a member of the Parti Islam Se-Malaysia (PAS) and Member of Parliament (MP) for Shah Alam, sued the defendants for libel. The first defendant was sued in his capacity as Chief Editor of the second defendant's publication. The second defendant had republished in toto an article that appeared on the official blog of another MP that portrayed the plaintiff as a person who was capable of distorting verses from the Holy Quran for his own political ends. That article was made in connection with the plaintiff's role in attempting to resolve a dispute over the relocation of a Hindu temple in Section 23, Shah Alam, which had stirred up strong emotions among the residents there. The defendants said the impugned article did not make any direct reference to the plaintiff and was not defamatory of him. They relied, inter alia, on the defence of qualified privilege, and said they merely republished an article that was already posted by another MP on his official blog and that the same privilege that attached to the article in its first publication on the blog extended to protect its republication by the second defendant. The defendants said they felt it was safe to republish the article in the blog because it had been written by an MP.

Held, allowing the claim and awarding the plaintiff RM70,000 in compensatory damages and costs:

(1) The verses quoted from the Holy Quran in the letter written by the plaintiff to the residents of Section 23 were confirmed by PW2 to be accurate (see para 21(c)).

(2) The second defendant made no attempt to verify the veracity of the article. No disclaimer was published to make known to its readers that the views expressed in the article were those of the MP of the blog and not

that of the second defendant and no opportunity was given to the plaintiff to give his views on the article, thus presenting a one-sided picture of him to the readers (see para 21(a), (b) & (c)).

(3) The court rejected the argument that as the article was extracted from the official blog of another MP it was thought safe to rely on it. Here, sensitive matters were raised and the standard of conduct required of the second defendant to constitute responsible journalism was much higher. The defence of reportage or responsible journalism raising qualified privilege was not applicable in this case (see paras 19–20).

(4) The second defendant's readers were mainly Malay Muslims, and there was no doubt the article defamed the plaintiff as it held him up to hatred and contempt of all Muslims who would have read it. It was even more injurious to the plaintiff as he was an MP on the platform of an Islamist political party. The article took on an even more serious connotation when it was published in connection with the relocation of a Hindu temple, which had stirred up violent emotions (see para 8).

(5) The defence of ancillary derivative privilege was rejected as the impugned article that appeared on the blog of the official website of the MP did not attract qualified privilege (see para 29).

[Bahasa Malaysia summary

Plaintif, ahli Parti Islam Se-Malaysia ('PAS') dan Ahli Parlimen (AP) untuk Shah Alam, menyaman defendan-defendan untuk fitnah. Defendan pertama disaman atas kapasitinya sebagai Ketua Pengarang penerbitan defendan kedua. Defendan kedua telah menerbitkan semula in toto artilel yang terbit di dalam blog rasmi seorang AP yang lain yang menggambarkan plaintif sebagai seorang yang berkebolehan memutarbelitkan surah-surah Al Quran untuk tujuan-tujuan politiknya sendiri. Artikel tersebut dibuat berhubung dengan peranan plaintif untuk mencuba menyelesaikan pertikaian ke atas penempatan semula kuil Hindu di Seksyen 23, Shah Alam, yang mencetuskan emosi marah yang meluap-luap di antara penduduk-penduduk di situ. Defendan-defendan menyatakan artikel tersebut tidak membuat apa-apa rujukan terus kepada plaintif dan bukan memfitnahnya. Mereka bergantung, antara lain, atas pembelaan kepentingan bersyarat, dan menyatakan mereka hanya menerbitkan semula artikel yang telah disiarkan oleh seorang AP yang lain dalam blog rasminya dan kepentingan yang sama yang terikat kepada artikel dalam penerbitan pertamanya di dalam blog diberikan untuk melindungi penerbitan semulanya oleh defendan kedua. Defendan-defendan menyatakan mereka berasa ia adalah selamat untuk menerbitkan semula artikel tersebut di dalam blog kerana ia ditulis oleh seorang AP.

Diputuskan, membenarkan tuntutan dan mengawardkan plaintif RM70,000 dalam pampasan ganti rugi dan kos:

(1) Surah-surah yang dipetik daripada Al Quran di dlaam surat yang ditulis oleh plaintif kepada penduduk-penduduk s 23 adalah disahkan oleh PW2 sebagai tepat (lihat perenggan 21(c)).

(2) Defendan kedua tidak membuat apa-apa percubaan untuk mengesahkan ketepatan artikel tersebut. Tiada penafian diterbitkan untuk memberitahu pembaca-pembacanya bahawa pandangan yang dinyatakan di dalam artikel tersebut adalah pandangan blog AP tersebut dan bukan pandangan defendan kedua dan tiada peluang diberikan kepada plaintif untuk memberikan pandangannya mengenai artikel tersebut, oleh itu mempamirkan hanya paparan sebelah plaintif kepada pembaca-pembaca (lihat perenggan 21(a), (b) & (c)).

(3) Mahkamah menolak hujahan bahawa artikel tersebut dipetik daripada blog rasmi seorang AP yang lain yang dikatakan adalah selamat untuk untuk digunakan. Di sini perkara-perkara sensitif dibangkitkan dan standard tindakan yang dikehendaki daripada defendan kedua untuk membentuk kewartawanan yang bertanggungjawab adalah lebih tinggi. Pembelaan laporan atau kewartawanan yang bertanggungjawab membangkitkan kepentingan bersyarat tidak beraplikasi dalam kes ini (lihat perenggan 19–20).

(4) Pembaca-pembaca defendan kedua sebahagian besarnya orang Melayu Islam, dan tidak terdapat kesangsian bahawa artikel tersebut memfitnah plaintif kerana ia membuatkan dia dibenci dan dihina oleh semua orang Islam yang membacanya. Ia akan lebih memudaratkan kepada plaintif kerana beliau adalah AP atas asas perjuangan parti politik Islam. Artikel tersebut mengambil konotasi yang lebih serius apabila ia menerbitkan berhubungan dengan penempatan semula kuil Hindu, yang mana mencetuskan emosi ganas (lihat perenggan 8).

(5) Pembelaan kepentingan terbitan sampingan ditolak memandangkan artikel yang dipersoalkan yang disiarkan di dalam blog laman web rasmi AP tidak membangkitkan kepentingan bersyarat (lihat perenggan 29).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

Cases referred to

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226 (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Dato Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor [1984] 1 MLJ 97 (refd)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd [2010] 2 MLJ 492, HC (refd)
Datuk Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 759, HC (refd)
Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor [1978] 1 MLJ 75 (refd)
Jameel & Anor v Wall Street Journal Europe Sprl [2007] 1 AC 359 (refd)
Lange v Atkinson [1998] 3 NZLR 424 (refd)
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 (refd)
Mark Koding v Public Prosecutor [1982] 2 MLJ 120, FC (refd)
Morgan v Odhams Press Ltd & Anor [1947] 2 All ER 1186, HL (refd)
Reynolds v Time News Paper Ltd [2001] 2 AC 127, HL (refd)
Roberts v Gable [2008] QB 502, CA (refd)
Syed Husin Ali v Syarikat Perchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)
Truth (NZ) Ltd v Holloway [1960] 1 WLR 997 (refd)

Legislation referred to

Printing Press and Publications Act 1984 s 8A
Sedition Act 1948

Mohd Hanipa (Azhana bt Mohd Khairudin (PDK) with him) (Mohamed Hanipa & Assoc) for the plaintiff.
Mohana Kumar (Shafie & Mohan) for the defendants.

Prasad Abraham J:

[1] This is a suit filed by the plaintiff YB Haji Khalid bin Abdul Samad for libel arising out of a publication by the second defendant of which the first defendant was the chief editor. The trial was heard over a period of days from the 7 June 201 and I found the defendants liable to the plaintiff for defamation. I then adjourned the matter for assessment of damages, which was undertaken by me and after hearing submissions from both counsel for the plaintiff and the defendant, I on the 14 October 2011 awarded a sum of RM70,000 as compensatory damages to be paid by the defendants to the plaintiff. On delivery of my oral judgment, I had informed counsel for both the plaintiff and the defendant that the court would render a written judgment in this case in view of the issues involved and the court now delivers the said written judgment. My judgment is at any rate now subject to an appeal to the Court of Appeal.

[2] The article in question is found bundle B pp 1–3 and also in p 7 of bundle A ie *ikatan pliding* ('the impugned article') and in view of the joint liability of the both first and second defendants, I have referred to both the defendants collectively. There have been several issues of law raised by both the plaintiff

and the defendants and I propose to deal with each one of them in turn.

WHETHER THE IMPUGNED ARTICLE REFERS TO THE PLAINTIFF

[3] The defendants contend that the impugned article makes no direct reference to the plaintiff. Even if the impugned article is read in context it cannot be taken to refer to the plaintiff. In fact, the defendants had raised this issue as a preliminary point during case management of this matter and I had ruled against the defendants as I was of the view that the court had to look at the entire circumstances of the case to determine whether or not the impugned article refers to the plaintiff. The defendants had appealed against that decision which has been withdrawn according to counsel for the defendants.

[4] The test as to whether a person although unnamed, has been sufficiently indentified in the impugned article is that of a fair minded reader not avid for scandal and not unduly suspicious when reading the impugned article would come to the conclusion that the words referred to the plaintiff (see *Evans on Defamation in Singapore and Malaysia* (3rd Ed), at pp 47 and 48).

[5] Looking at the impugned article, it is clear the issue of the relocation and construction of the Hindu temple in Section 23 Shah Alam, which had aroused strong feelings and objections from the residents there was within the vicinity of the Parliamentary constituency of Shah Alam of which the plaintiff was the Member of Parliament. All the residents or the majority of them would have been aware of the plaintiff's role in attempting to resolve the temple issue. The plaintiff in fact had written a letter to the residents of Section 23 Shah Alam (see bundle B p 10). All these facts, I hold would link the impugned article to the plaintiff. Those who knew of these facts when reading the impugned article would identify the same by reference to the plaintiff. The fact the impugned article refers to 'Pak Janggut' when it was argued by the defendants that plaintiff could best be referred to 'Pak Jambang' would not detract a reasonable person from identifying the impugned article as referring to the plaintiff. The defendants witnesses maintain that they had no idea that impugned article was referring to the plaintiff. Having considered the evidence of the plaintiff, and applying the objective text ie a person who looks at the impugned article as a whole would certainly have the impression bearing in mind this was a sensitive and highly publicised issue would find the impugned article refers to the plaintiff (see *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226, at p 234) where His Lordship Abdul Hamid J held and I quote:

(1) the article was such as would lead those who were dealing with the plaintiff to the conclusion that the article referred to him and that the defamatory words used were referable to the plaintiff and were so used with the intention of identifying him; and

(2) the plaintiff has failed to prove his case in respect of the letters sent to the agent and policy-holders of the company. The letters were published primarily to protect the company's interest with no intention whatsoever to link the plaintiff to the words or words complained of

[6] I refer to the case of *Morgan v Odhams Press Ltd & Anor* reported in [1947] 2 All ER 1186, a decision of the House of Lords cited by counsel for defendant where it was held by the majority of the law lords:

(a) there were no grounds for holding that the newspaper article could not reasonably have been understood to have been referring to the plaintiff; although a critical reading of the article would have revealed discrepancies of time and place between the newspaper story and the facts of Ms stay in the plaintiff's company it was not to be contemplated that readers of a newspaper article of this kind would in the ordinary was read it with such critical care; there was nothing in the evidence given by the witnesses to show that they could not have been regarded as having acted reasonably in assuming that the article referred to the plaintiff; accordingly in view of his evidence, the judge had rightly left to the jury the question of fact whether on the evidence as a whole readers having knowledge of the circumstances would reasonably have understood that the article referred to the plaintiff (see p 1163d to f, p 1168h, p 1170b and f, p 1171b, p 1183e, f and j to p 1184b and d to f, post); and

(b) it could not be held that it contained nothing which pointed to him because:

(i) (per Lord Reid and Lord Morris of Borth-y-Guest, Lord Guest and Lord Donovan concurring) there was no rule that, before an article could be said to be defamatory of a person, it must contain within itself some 'key or pointer' indicating that it referred to him; where necessary extrinsic evidence was admissible to import a defamatory meaning to words otherwise innocent (see p 1160h, p 1162 c, p 1170 d, p 1175b and c and p 1180h, post); *Cassidy v Daily Mirror Newspapers Ltd* [1940] 3 All ER 31 applied; *Astaire v Campling* [1965] 3 All ER 666 distinguished; and

(ii) (per Lord Pearson) although it was right to say that, in order to be defamatory of the plaintiff, the article must contain something which to the mind of the reader with knowledge of the relevant circumstances, contained defamatory imputations and pointed to the plaintiff as the person defamed, the defendants' article could in the light of the circumstances be interpreted as referring to the plaintiff (see p 1184g, post).

IS THE IMPUGNED ARTICLE DEFAMATORY?

[7] There appears to be several formulations of how words are to be looked at to determine whether they could be said to be defamatory. Generally it has been held that if the words complained of tend to lower the plaintiff in the estimation of right thinking men in general, or expose him to hatred contempt

or ridicule or would cause him to be shunned or avoided, those statement or words would be held to be defamatory (see the case of *Syed Husin Ali v Syarikat Perchetakan Utusan Melayu Bhd & Anor* reported in [1973] 2 MLJ 56). His Lordship Mohd Azmi J in that case set out the test of the defamation found at p 59 of his judgment and I quote:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[8] In applying the various tests as to whether the impugned article is defamatory or not. I would prefer the approach of deciding whether the impugned article would lower the estimation of the plaintiff in the eyes of a particular control group. The question to be addressed would be whether the impugned article would tend to excite against the plaintiff an adverse opinion within the control group selected by court. The impugned article will be held to be defamatory even though no one may actually believe that the statement is true. As long as it would lower the plaintiff's estimation in the eyes of the control group, the plaintiff would have made out a case that the impugned article is defamatory. So for example, the impugned article being read by a majority of readers who are not Muslims would not have the effect of lowering the estimation of the plaintiff in their eyes. In our case, the second defendant's circulation of readers would be in the main Malay Muslims and to publish the impugned article suggesting the plaintiff is a person who is inclined to distort verses from the Holy Quran would certainly not only cause the plaintiff's estimation to be lowered in the eyes of this control group but also subject the plaintiff to contempt, ridicule even hatred in a matter as sensitive as this. This is even more injurious to the plaintiff, bearing in mind the plaintiff was and is the member of Parliament for Shah Alam and stands on the platform of a political party, *Parti Islam Se-Malaysia (PAS)* which is an Islamic based party. The impugned article takes on an even more serious connotation when it was published in connection with the relocation of a Hindu temple in Section 23 Shah Alam, and that issue had stirred up violent emotions as it was involving religious issues.

[9] In the case of *Syed Husin Ali* referred to aforesaid the alleged defamatory article was the plaintiff was dishonest, disloyal to the government an irresponsible politician, an ungrateful person, a supporter of President Sukarno of Indonesia and instigator of unrest in the country. In considering whether the words were defamatory or not, the court in that case having regard to all the circumstances found the statement to be defamatory. In our case, the allegations are even more serious in nature in that the plaintiff was portrayed as

a person who was capable of distorting verses from the Holy Quran for his own political purposes which to my mind is much more serious than in the case referred to. If one had assessed the balance of seriousness of the impugned article in our case, it would probably be on the highest point on a scale similar to the Richter scale.

[10] In another decision ie *Dato Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor* reported in [1984] 1 MLJ 97 the judgment of Siti Norma Yaakob J, here the defamatory statement amongst others included an allegation that the plaintiff's un-Islamic attitude in choosing a Friday, the Muslim Holy day to declare open a Chinese temple was an action unbefitting of a Muslim leader. The court found that this was defamatory and I refer Her Ladyship's judgment at p 99 paragraph a right hand column where she said:

> (3) The nature of the libel following *Datuk Patinggi*'s case more enormous, outrageous, scandalous or scurrilous the defamation, the greater should be the damages. In this case, the Plaintiff is depicted as being corrupt and had abused his position as Chief Minister and President of the Berjaya Party to further his own financial interests and those of the other members of his family. He is also pictured as a leader wanting in honesty and integrity and as such is unfit to hold the public offices of the Chief Minister and that of the Berjaya Party, and as a Muslim leader, he should be condemned as he has no respect for the teachings of Islam.

[11] In the case of *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75. Here the defamatory words used was to describe the plaintiff as 'Abu Jahal'. The court found these words to be defamatory and His Lordship Ibrahim J in his judgment found at p 76, left hand column and I quote:

> Even the two dictionaries do not give a good meaning of 'Abu Jahal' and I agree with DW1 when he said that 'Abu Jahal' may be used to denote a Muslim who has one of the qualities, character and attitudes of Amru bin Hisham, eg a person who tells lies and that 'one of the ways of disrupting the good work of another would be by telling lies against him'. I am therefore of the view that the words used were defamatory of plaintiff though not to the extent imputed by him. As the description of plaintiff as 'Abu Jahal' was qualified by the reason that it was on account of his very big lies it would appear to me that the words used were likely to be understood by the ordinary right-thinking and reasonable Malays of ordinary intelligence with the ordinary man's general knowledge of the Islamic religion and experience of wordy affairs to mean that plaintiff was a very big liar and an irresponsible person just as 'Abu Jahal' was and not that plaintiff had all the detestable qualities of 'Abu Jahal'.

[12] I therefore find the impugned article to be defamatory of the plaintiff as it holds him up to hatred and contempt of all Muslims who would have read the impugned article. Bearing in mind the defendants circulation was in the main focused on a Malay Muslim readership, looking at the impugned article as a whole I have no doubt the impugned article is defamatory.

THE IMPUGNED ARTICLE WAS REPUBLISHED

[13] The impugned article in question was republished by the second defendant in toto having extracted the impugned article from the official blog of YB Zulkifli Noordin, a fact not in dispute. In *Gatley on Libel and Slander* (8th Ed), at p 117, and I quote:

> Every republication of a libel is a new libel and each publisher is answerable for his act to the same extent as if the calumny originated with him.

(See *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997 at pp 1000–1003) a decision of the Privy Council. It is no defence to an action for republication that the defendant received the libelous statement from another whose name was disclosed at time of publication as is the situation in our case. The second defendant who republishes the impugned article is deemed to have approved endorsed or repeated the same. However the defences of privilege and justification would be available to the defendants.

[14] I find the impugned article bears the defamatory meanings as pleaded by the plaintiff and the plaintiff has discharged the general burden of proof on the plaintiff to show the same. I now turn to consider the various defences raised by the defendants.

QUALIFIED PRIVILEGE

[15] The defendants rely under this defence afforded by law (i) reportage privilege and (ii) ancillary derivative privilege.

[16] With regards to (i) counsel for the defendant in his submissions took the court through the development of the law in this area of the law from the case of *Jameel (Mohammed) & Anor v Wall Street Journal Europe Sprl (HL(E)* [2007] 1 AC 359 NB at pp 368–421 when Lord Hoffmann noted at para [62] of that report observed:

> In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth.

[17] And Baroness Hale at para [149]:

> the tone in which the information is conveyed with be relevant to whether or not the publisher has behaved responsibly in passing it on.

[18] This defence has developed and was dealt exhaustively by the House of Lords in *Reynolds v Time News Paper Ltd* [2001] 2 AC 127 where the House of Lords accepted and recognised a general public interest defence for defamation where the media reports on matters of public interest and so long as it practices responsible journalism. The House of Lords in that case had set out a ten point non-exhaustive circumstantial test of responsible journalism (see pp 133–135 *Evans on Defamation in Singapore & Malaysia* (3rd Ed)). There can be no doubt in my mind the impugned article covered an area of public interest but was the republication of the impugned article justifiable or not. Did the second defendant behave fairly and responsibly in gathering and publishing the impugned article. In determining this question, the court has to apply a flexible and practical approach in reviewing the conduct of the second defendant.

[19] In this case the evidence is clear that the second defendant just picked up the article of YB Zulkifli Noordin from his official blog and republished it in toto without any verification of the veracity of the article all. The second defendant maintains that the impugned article was extracted from the official blog of YB Zulkifli Noordin and as he was MP, it was thought safe to rely on it. The court rejects that argument in toto.

[20] In the instant case where the impugned article constitutes a republication of the views of the author albeit YB Zulkifli Noordin an MP, where such sensitive matters are being raised ie the allegation of the distortion of the some verses of the Holy Quran to further the plaintiff's political agenda especially in the backdrop of a sensitive issue such as the relocation of a Hindu Temple to Section 23 of Shah Alam, the standard of conduct required of the second defendant would be much higher to constitute responsible journalism.

[21] Perusing through the evidence in this case if is clear:

(a) the second defendant through the journalists who gave evidence, no attempt was made to verify the veracity or otherwise of the impugned article and or its contents;

(b) no disclaimer was published to make it known to its readers that the views expressed in the impugned article were those of YB Zulkifli Noordin and not the views of the second defendant; and

(c) no opportunity was given to the plaintiff to give his views on the impugned article at all thus presenting a rather one sided file picture of the Plaintiff to the readers of the second defendant. This is further aggravated by the fact that the letter written by the plaintiff to the residents of Section 23 which quoted verses from the Holy Quran were confirmed by PW2 to be accurate.

[22] I refer to some of the cases referred to the court by counsel for the

defendant. Firstly the case of *Roberts v Gable* [2008] QB 502, a decision of the Court of Appeal. This case seems to suggest that as long the impugned article is reported in a neutral fashion and is of public interest the defence of reportage is made out. I would like to point out that in the *Reynold*'s case the weight to be given to each of the factors set out in that case will vary from case to case. I also prefer the approach of the House of Lords in *Jameel & Ors v Wall Street Journal Europe Sprl* [2007] 1 AC 359 where the House of Lords restated that the question in each case is whether the news paper had behaved fairly and responsibly in gathering and publishing the libelous article or statements and their conduct are examined as a whole.

[23] I also refer to the case of *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd* reported in [2010] 2 MLJ 492 where His Lordship Harminder Singh JC held:

> (2) The impugned article and the imputations conveyed concerned government and political matters. There was no evidence that the writer of the impugned article had reasonable grounds for believing that the writer of the impugned article had reasonable grounds for believing that the imputation was true. For the defendants to rely almost solely on the magazine without any verification was poor journalism. The defendants had also failed to seek a response from the plaintiff. The article by the defendant was therefore not a piece of responsible journalism to which the defence of qualified privilege was available (see paras 63, 65, 67 & 73).
>
> (3) The more general privilege known as reportage would only apply in cases where there is an ongoing dispute where allegation of both sides are being reported. The allegations must be reported in a fair, disinterested and neutral way. This was therefore not a case of reportage. The article was not about a continuing dispute between parties. Even if it was, there was only the version of one side (see paras 76 & 78).

[24] His Lordship undertook a illuminating evaluation of all the leading decisions on the defence of reportage and I am in agreement with the views of His Lordship expressed in his judgment and I am further of the view his views are pertinent to the issues in this present case. For all the above reasons, I find reportage or responsible journalism raising qualified privilege is not applicable in this case and I dismiss the same.

[25] Counsel for the defendant made reference to a dictum of mine in the case of *Datuk Annas Khatib bin Jaafar v Datuk Manja Ismail & Ors* reported in [2011] 8 MLJ 759 and the last page of judgment where I had said:

> It is the view of this court that so long as the defendant advanced matters of public interest within the confines of responsible journalism, they were always be in a position to enjoin the court to declare the reassertion of the guarantee to the freedom of speech enshrined under art 10 of the Federal Constitution. This

approach would be consonant with the aspirations of modern society for transparency and accountability whilst protecting against blatant maligning of the reputation of individuals.

[26] However I am also reminded of the rather apt and cautionary words of His Lordship Gopal Sri Ram JCA in the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* reported in [1999] 1 MLJ 375 of the report wherein His Lordship had said and I quote:

> The fact that the respondent is a newspaper does not in my judgment place it in any special position in the law of libel. As Lord Shaw said in *Langlands v Leng* [1916] SC (HL) 102 at p 110: 'A newspaper has the right, and no greater or higher right, to make comment upon a public officer or person occupying a situation than an ordinary citizen would have'. Indeed, by reason of their capability to formulate and influence public opinion, those having control over the dissemination of news or views, whether by means of the print or electronic media, should act responsibly Where publication is said to be factual, they must ensure that the facts they make available to their readers, listeners or viewers are true. And where they comment upon matters of public interest, they must ensure that the language they use is not inflammatory or tainted with bias. They must bear in mind the serious consequences that might ensue as a result of irresponsible publication or sensationalising of news or views in a multiracial country such as ours where there are many sensitive issues that are held in delicate balance. It is in recognition of these matters that Parliament has made the publication of false news an offence (see s 8A of the Printing Press and Publications Act 1984.) It is well established jurisprudence that courts should keep in tandem with the national ethos as reflected in the written laws passed by an elected legislature. In the present context, this is achieved by enforcing the law of defamation in such a way as to ensure that there is truth in journalism while encouraging healthy and constructive criticism. For it must not be forgotten that the fundamental right to freedom of speech and expression guaranteed by art 10 of the Federal Constitution carries with it a duty to exercise that right with a proper sense of responsibility.

[27] The court has to take a balanced approach to the sensitivities of a multicultural, multi religious society which require a high standard of caution to be exercised by the media as responsible media, while cases from the United Kingdom and Australia and other parts of old Commonwealth are instructive it must be borne in mind, they have had hundreds of years head start in the history of their respective nations unlike ours, and we must exercise caution. The facts of this case clearly reflect that. The relocation of a Hindu Temple for all the right and lawful reasons but if reported with all the emotional undertones would again arouse anger and suspicion. The point here is if responsible journalism is not practiced as prescribed by local conditions, this would ignite flames that cannot be doused. However it is to be noted the concept of reportage has been accepted by our courts, but we vary in its application.

ANCILLARY DERIVATIVE PRIVILEGE

[28] The impugned article punished on the official blog/website attracts qualified privilege, as an MP the said Zulkifli Noordin has a legal social and moral duty to publish the same to the public at large. If the same is republished then the same privilege would extend to the impugned article, so submits counsel for the defendant (see *Evans on Defamation* (3rd Ed), at pp 141–143).

[29] It is my considered view that the impugned article appearing on the blog of the official website of YB Zulkifli Noordin does not attract qualified privilege as the same does not relate to the actions and qualities affecting the capacity of the plaintiff as to his actions as an mp including the plaintiff's ability and willingness to meet public responsibilities (see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520). See also *Lange v Atkinson* [1998] 3 NZLR 424). To publish an attack on the plaintiff by YB Zulkifli Noordin as to alleged distortion of the verses of the Holy Quran when the verses referred to in the plaintiff letter (see bundle B p 10) were correct certainly removes the protection of qualified privilege if there was any to begin with. I would therefore reject the said defence of ancillary derivative privilege.

[30] When applying ancillary derivative privilege in particular reference to members of Parliament it must be borne in mind the impugned articles were not statements that the said Zulkifli Noordin uttered in Parliament or at least there is no evidence to suggest that. Even if it was uttered in Parliament, the law has restricted the absolute privilege afforded to members of Parliament to say what they wish to say in Parliament. For instance, the Sedition Act 1948 (revised 1969) allows members of Parliament to be prosecuted for sedition for statements uttered in Parliament (see *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120).

[31] Again this is driven by the complexities of Malaysian society with its facets of multi cultural and multi religious and diverse ethnic makeup. In the present stage of the nation's history, we are at best tolerant of one another but have not really migrated to acceptance of each other and until that happens ancillary derivative privilege and any extension of it must be viewed cautiously.

[32] In the light of these findings, I find the plaintiff has made out a case for defamation against the defendants.

DAMAGES

[33] As to the issue of damages I adjourned the matter for two weeks to enable counsel to prepare to submit on damages. Having heard both counsel on

the matter I awarded a lump sum of RM70,000 as compensatory damages and costs (see *Datuk Harris bin Mohd Salleh v Abdul Jallil & Anor* [1994] 1 MLJ 97). I took into consideration the need to compensate for the harm done to the plaintiff's personal reputation as an MP of an Islamist based Party being accused of distorting verses from the Holy Quran and the vindication of the plaintiff reputation and also to redress the hurt caused to the plaintiff (solatium). I also took into account the fact the plaintiff had failed to initiate an action against the publisher of the impugned article and the delay in bringing this action. I also took into consideration the circulation of the second defendant and its impact bearing in mind its readers were mainly Malays Muslim and its circulation was nationwide. For all these reasons I awarded damages in the sum of RM70,000.

[34] Before I conclude, the court expresses its gratitude and appreciation to both counsel for the professional manner they conducted this trial and the voluminous research they had undertaken on the matters raised.

Claim allowed. Plaintiff awarded RM70,000 in compensatory damages and costs.

Reported by Ashok Kumar